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IN THE

Supreme Court of the United S

OCTOBER TERM, 1971

Docket No. .....

Supreme Court, U.
FILED
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MICHAEL RO[illegible], JR.,

MICHAEL FHAGEN and MIRIAM WINTERS,

Petitioners,

—v.—

ALAN D. MILLER, M.D., individually and as Commissioner of Mental Hygiene of the State of New York, and ALEXANDER THOMAS, M.D., individually and as Director of the Psychiatric Division, Bellevue Hospital Center,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

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Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

The petitioners pray that a writ of certiorari issue to review the remittitur and judgment of the Court of Appeals of the State of New York entered in this proceeding on January 6, 1972 (Appendix p. 19).

Opinions Below

The opinion of the Supreme Court, New York County, is reported at 65 Misc.2d 163, 317 N.Y.S.2d 128, and appears in the Appendix hereto at p. 22. The Opinion of the Appellate Division, First Department, is reported at 36 A.D.2d 926, 321 N.Y.S.2d 61, and appears in the Appendix hereto at p. 38. The Opinion of the Court of Appeals is reported

at 29 N.Y.2d 348, 328 N.Y.S.2d 393, and appears in the Appendix hereto at p. 40.

Jurisdiction

The remittitur and judgment of the Court of Appeals was entered on January 6, 1972. On March 20, 1972, Mr. Justice Marshall granted an extension of time in which to file this petition to and including May 15, 1972. The jurisdiction of this Court rests upon 28 U.S.C. Section 1257(3).

Questions Presented

Whether persons alleged to be mentally disabled can be deemed, by their inaction, to have knowingly and intelligently waived their right to a lawyer and a judicial hearing to oppose involuntary hospitalization.

Whether persons who are not alleged to be physically dangerous to themselves or others may be summarily hospitalized against their will without notice or opportunity for a prior judicial hearing, or, if already hospitalized, may be confined for an additional period of time without notice or opportunity for a prior judicial hearing.

Whether persons may be hospitalized against their wills when the individuals recommending hospitalization have not considered or explored less drastic alternatives.

Statutes Involved

The statutes involved, sections 78 and 72 of the New York Mental Hygiene Law, appear in the Appendix hereto at pp. 48 and 49.

Statement of the Case

This action was initially filed as a Civil Rights Action in the United States District Court for the Southern District of New York.[1] On December 4, 1969, the Hon. Edward Weinfeld ruled that the complaint, which questioned the validity of sections 78 and 72, raised substantial constitutional questions, and ordered the convening of a three-judge federal court. *Fhagen* v. *Miller,* 306 F. Supp. 634 (SDNY 1969). On April 20, 1970, however, by an unreported decision, the three-judge court abstained on the ground that state court construction of the challenged statutes might avoid some or all of the constitutional issues.

On June 22, 1970, petitioners filed a state court action raising, as the New York Court of Appeals subsequently noted, "essentially the same constitutional objections to the Mental Hygiene Law" as had been raised in the federal action (Appendix p. 43).

On December 9, 1970, the State Supreme Court ruled that sections 78 and 72 were, as construed, constitutional (Appendix p. 22). On May 13, 1971, the Appellate Division, First Department, modified and affirmed the judgment of the Supreme Court (Appendix p. 38).

On January 6, 1972, the Court of Appeals affirmed the final order of the Appellate Division (Appendix p. 40).

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[1] For a related case, see *Winters* v. *Miller,* 446 F.2d 65 (2d Cir. 1971), *cert. den. sub nom. Miller* v. *Winters,* —— U.S. ——, 30 L. Ed.2d 369 (1971), which summarizes facts pertinent also to this proceeding. The majority in that case found, as Judge Moore remarked in dissent, "that the §§78 and 72 procedures are inadequate from a due process point of view to justify" the state's assumption of a *parens patriae* role (446 F.2d at 74).

On January 20, 1972, petitioners, uncertain of their remedy, made a motion to restore the case to the calendar of the three-judge federal court. On March 21, 1972, however, the three-judge federal court, after examining the entire state court record, ruled that petitioners had unreservedly raised and litigated each of the federal constitutional issues in the state courts, and thereupon dismissed the federal complaint, leaving petitioners "free to seek review by appropriate action in the Supreme Court."

Petitioner Winters is a 59 year old unmarried woman. According to her undisputed affidavit, in early April of 1968 she moved to the King Edward hotel and selected for permanent residence a room approved by her Welfare Department caseworker and by the hotel management. On May 2nd, when she attempted to pay rent for that month, she was told to move to a rear room which she considered to be too shabby, and which she and her caseworker had earlier rejected. Her room, she was now told, was for "transients," not for permanents. As the Supreme Court found, the hotel management then called the police, who forcibly removed her from her room and, pursuant to section 78(3), transported her to Bellevue Psychiatric Hospital where she was admitted pursuant to section 78(1) (Appendix p. 26). There is no evidence, or even claim, that petitioner Winters had threatened or attempted to inflict physical injury upon herself or others, or had in any way annoyed her neighbors in the King Edward hotel, or the public.

On May 7, 1968, while petitioner Winters was hospitalized and receiving treatment, two Bellevue physicians executed a certificate which alleged that she was mentally ill, and which changed the status of her confinement from sec-

tion 78 to section 72, thereby extending her involuntary hospitalization for an additional sixty days (Appendix p. 26). Petitioner Winters was not given notice of that proposed extension of hospitalization and had no opportunity, prior thereto, to oppose it. Ultimately, on July 18, 1968, she was administratively discharged, without ever appearing in court.

Petitioner Fhagen, as the Supreme Court found, "was twice committed to Bellevue Hospital pursuant to Section 78 of the Mental Hygiene Law, and his further confinement beyond thirty days was effected by invoking the 'two physician' procedure of Section 72 of the Mental Hygiene Law" (Appendix p. 25). According to petitioner Fhagen's uncontested allegation, "he was confined for almost seven weeks without ever being accorded a judicial hearing . . . [and] even after he had filed his written request for release he was detained for over three weeks without a hearing." *Fhagen* v. *Miller,* 306 F. Supp. at 636. He was then administratively discharged.

How the Federal Questions Were Raised

The state court complaint demanded a judgment declaring sections 78 and 72 to be unconstitutional under the Fourth, Fifth and Fourteenth Amendments to the United States Constitution on each of the grounds raised in this petition. On July 27, 1970, petitioners made a motion for summary judgment, asking the Supreme Court to grant summary judgment for the relief demanded in their complaint. Petitioners thereafter appealed from denial of that motion to the Appellate Division, First Department, and then to the Court of Appeals.

REASONS FOR GRANTING CERTIORARI

I.

The New York State Court of Appeals decided federal questions of substance not theretofore determined by this Court.

A. *The Constitutionality of the Presumption of Waiver.*

In New York, as in the majority of states, judicial hearings and the appointment of counsel for persons alleged to require involuntary hospitalization are not mandatory. In New York, a person can be hospitalized involuntarily for his entire life without ever appearing before a judge. He can be hospitalized for 30 days under section 78,[2] then for an additional 60 days under section 72. Thereafter, he can be detained only under court order, but the order can be issued, and almost always is, without a hearing.

The patient confined under section 72, for example, will never receive a court hearing unless he affirmatively demands a hearing, in writing (Appendix p. 51).[3] This

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[2] Since the filing of this case the 30 day period has, by regulation, been reduced to 15 days. 14 NYCRR 62.2.

[3] The hearing may also be demanded by a relative, friend, or the Mental Health Information Service, but that almost never happens. The MHIS is grossly understaffed, especially in upstate New York where most of its employees are social workers, not lawyers. Jacobi Hospital, for example, has only one MHIS employee to handle 3,431 involuntary admissions per year—15 per work day (Rosenzweig Affidavit), not counting the continuing work load of previously admitted patients. Other hospitals are even less adequately staffed with MHIS employees. Accordingly, many patients never see a MHIS employee for days or weeks after admission. Furthermore, the patient will not receive notice of his right to demand a court hearing until five days after his admission (Appendix p. 51), if then (Appendix p. 27).

means, in practice, that the theoretical right to a hearing and to a court appointed lawyer is a sham. A study financed by the National Institute of Mental Health showed that in Bellevue in 1966 only 531 of the 4,496 patients held involuntarily under section 72 actually requested judicial hearings. The 12% request rate for 1966 continued through 1967 and declined to 7% in 1969.[4] Failure to request a hearing has important consequences. In 1966, 33.4% of those patients who did request a judicial hearing were discharged, compared with a discharge rate of 6.9% for those who did not request a hearing.[5] Thus, each year, in New York alone (and similar procedures prevail in many states) hundreds and perhaps thousands of people are deprived of their liberty because the statutes under which they are hospitalized place upon them the burden of bringing their plight to the attention of a court. To make matters worse, once hospitalized, patients are immediately subject to shock-therapy and tranquilizing medication, both of which may render the patient incapable of exercising his theoretical right to a hearing. E.g., *Thorn* v. *Superior Court of San Diego,* 83 Cal. Rep. 600, 464 P.2d 56 (1970); MENTAL ILLNESS AND DUE PROCESS, the Association of the Bar of the City of New York (1962), pp. 26 and 138.[6]

B. *Summary Hospitalization of Non-Dangerous Persons.*

It would be difficult to imagine a more harmless person than petitioner Winters. Except for minor verbal alter-

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[4] Kumasaka (M.D.), Stokes (M.A.) and Gupta (L.L.M.), "Criteria of Involuntary Hospitalization," unpublished study (Public Health Service Grant MH 16485), p. 3.

[5] *Id.*

[6] Petitioners Fhagen and Winters both alleged, without contradiction, that they were forced daily to take tranquilizing medications. And see, *Winters* v. *Miller, supra* note 1.

cations with a few of the residents in a previous hotel (see *Winters* v. *Miller, supra,* note 1), she had lived quietly, keeping to herself, without incident, for 59 years. Even if she had been mentally ill, which she vigorously disputes,[7] there was certainly no emergency which required that she be deprived of her liberty without notice or a prior opportunity to defend. Had she been given that opportunity, it is inconceivable that she would have been hospitalized. But she, and thousands like her, have been permanently and unnecessarily stigmatized with the label "mental patient." No societal interest required that she so summarily be stigmatized.

Involuntary hospitalization, even if promptly rectified, has continuing adverse consequences.[8] Thus, unless very substantial state interests are involved, the state should not subject citizens to involuntary hospitalization without prior notice and an opportunity to defend. At common law, the only state interest which justified summary hospitalization was the probability, absent hospitalization, of imminent physical injury to the patient or others. *Warner* v. *State,* 297 N.Y. 395, 401 (1948). To permit summary hospitalization for less compelling reasons invites precisely the type of abuse present in this case.

The New York Court of Appeals ruled that summary hospitalization of non-dangerous persons was constitutional (Appendix p. 40). It believed that "the preserva-

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[7] Her hospital records acknowledged that her "judgment" was "normal," and that her "recent memory, retention and recall, counting and calculations, school and general knowledge, and abstraction ability" were all "good."

[8] Petitioner Fhagen, for example, has been denied several jobs because he is a former patient.

tion of public order and public health" justified "immediate action" (Appendix p. 45). As examples of what it meant by public order and public health, the Court of Appeals mentioned "disorderly conduct, criminal nuisance, public lewdness, or sexual abuse of a minor" (Appendix p. 45). Even if those four state interests are of sufficient magnitude to justify summary hospitalization, which petitioners dispute, they are irrelevant to the facts of this case. No one even claimed that petitioners Winters and Fhagen had engaged in disorderly conduct, criminal nuisance, public lewdness, or sexual abuse of a minor. They, and thousands like them, were hospitalized without notice or hearing because of a concept no more precise than "public order and public health."

The state's interest in the summary hospitalization of the non-dangerous mentally ill is indeed negligible. But the state's interest in summarily extending the period of hospitalization of a person already hospitalized and receiving treatment, is even less apparent. There is in the record uncontradicted evidence that in 1968, for example, two-thirds of all section 72 "admissions" to New York State mental hospitals were, in fact, retentions of patients who had already been hospitalized under some other section, usually section 78, when the certificate required by section 72 was executed. Once a person is hospitalized, by whatever means, there is no conceivable state interest sufficient to justify extending his period of hospitalization without prior notice and opportunity for a hearing.

C. *Less Drastic Alternatives.*

Even if a person is mentally ill, it is usually not necessary that he be subjected to full-time hospitalization. Sev-

eral studies have shown, using random samples of persons who would otherwise have been hospitalized, but who were in fact treated in day hospitals or in the community, on an out-patient basis, that the out-patient groups did significantly better than control groups of in-patients, and cost the state only half as much money.[9] Sections 78 and 72, however, do not require the consideration or exploration of less drastic alternatives.

Petitioner Fhagen was released from Bellevue to receive out-patient treatment. But as the Supreme Court found, it was he, not the staff at Bellevue, who came up with that viable alternative (Appendix p. 36). An uncontradicted affidavit in the record states that the Bellevue psychiatrist who was on his way to testify that petitioner Fhagen required long-term hospitalization did not even know, until advised by Fhagen's attorney, that Fhagen had left Bellevue on a pass and had been examined by two psychiatrists who, after examination, expressed willingness to treat him on an out-patient basis.

Most patients, including petitioner Winters, are not as familiar with community alternatives as was petitioner Fhagen. Unless the hospital explores those alternatives, those patients will continue to be unnecessarily confined. The Supreme Court, however, ruled that although exploration of less drastic alternatives was "meritorious," it was not constitutionally required (Appendix p. 36).

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[9] Wilder, Levin & Zwerling, "A Two-Year Follow-up Evaluation of Acute Psychotic Patients Treated in a Day Hospital," 122 American Journal of Psychiatry 1095 (1966); Langsley, "Family Crisis Therapy," 7 Family Process 145 (1968).

II.

The ruling below is not in accord with applicable decisions of this Court.

A. *The Presumption of Waiver.*

The ruling below is inconsistent with the general principles governing waiver of counsel or a hearing announced in *Johnson* v. *Zerbst,* 304 U.S. 458, 464 (1938), *Boykin* v. *Alabama,* 395 U.S. 238 (1969), *Carnley* v. *Cochran,* 369 U.S. 508 (1962), *Swenson* v. *Bosler,* 386 U.S. 258 (1967), *Glasser* v. *United States,* 315 U.S. 60 (1941), *Von Moltke* v. *Gillies,* 332 U.S. 707 (1947), and *Aetna Insurance Co.* v. *Kennedy,* 301 U.S. 389, 393 (1937).

It is particularly inconsistent with the principles governing persons who are alleged to be, or who may be, under mental disability announced in *Pate* v. *Robinson,* 383 U.S. 375 (1966), and *Covey* v. *Town of Somers,* 351 U.S. 141 (1956).[10]

In *Pate* v. *Robinson,* seven members of this Court ruled that a defendant's failure to demand a sanity hearing concerning his competence to stand trial did not constitute a waiver of the right to such a hearing because "it is contradictory to argue that a defendant may be incompetent, and yet knowingly or intelligently 'waive' his right to have the court determine his capacity to stand trial" (383 U.S. at 384). Mr. Justice Harlan, joined by Mr. Justice Black, dissented on other grounds but agreed that "waiver is not an apposite concept where we premise a defendant so deranged that he cannot oversee his lawyers" (383 U.S. at

[10] See also, *In Re Gault,* 387 U.S. 1 (1967).

388). Thus, even though Robinson had a court-appointed lawyer, and even though his lawyer could expressly have demanded a sanity hearing, but did not, this Court unanimously found there was no waiver. Certainly the same rule should apply to these petitioners, who had not been assigned lawyers.

In *Covey* v. *Town of Somers,* this Court ruled that notice to a person who was at the time legally competent but who was known to be under mental disability (and who was shortly thereafter hospitalized) of that person's right to appear and oppose a judicial foreclosure proceeding was not constitutionally sufficient, and that her failure to appear and defend did not, therefore, preclude suit by a subsequently appointed committee to reopen the foreclosure. Because incompetent persons are often incapable of exercising their theoretical right to a hearing, this Court ruled that "notice to a person known to be an incompetent who is without the protection of a guardian does not measure up to" the requirements of due process (351 U.S. at 146).[11] *Covey* thus compels a finding that the statutes here under consideration are unconstitutional.[12]

To rule in petitioners' favor would not mandate judicial hearings in every case. It would, however, require that all involuntary patients be given judicial hearings, either before or promptly after hospitalization, unless they affirma-

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[11] To the same effect, see *Dale* v. *Hahn,* 440 F.2d 633, 638-639 (2d Cir. 1971).

[12] The lower federal courts have criticized statutes which allowed mental patients to demand judicial hearings but which, absent request, did not mandate a hearing at any time. E.g., *Anderson* v. *Solomon,* 315 F. Supp. 1192, 1194 (D.Md. 1970) (three-judge court); *Heryford* v. *Parker,* 396 F.2d 393 (10th Cir. 1968). And see, *Fuller* v. *Mullinax,* 364 Mo. 858, 269 S.W.2d 72 (1954).

tively waived their right to a hearing *after* consultation with assigned counsel.

B. *Summary Hospitalization or Retention of the Non-Dangerous Mentally Ill.*

As this Court noted less than two months ago, "compulsory psychiatric treatment," even when ordered by a court after a full-scale hearing, is usually based "not solely on the medical judgment that the defendant is mentally ill and treatable, but also on the social and legal judgment that his potential for doing harm, to himself or to others, is great enough to justify such a massive curtailment of liberty." *Humphrey* v. *Cady,* —— U.S. ——, 31 L. Ed.2d 394, 402 (1972).

The decision below, however, authorizes such massive curtailments of liberty *without* court hearings for persons who are entirely harmless.

Although section 78 purports to be the "emergency" hospitalization section, respondents' affidavits acknowledged that nearly 100% of the admissions to Bellevue and other New York City mental hospitals are under section 78.

Section 78 permits a person to be apprehended in the community and transported to a mental hospital based upon nothing more substantial than the allegation of a layman (in petitioner Winters' case, a hotel clerk) that said person is "in need of immediate observation, care or treatment for mental illness." Section 72 authorizes summary hospitalization upon the certificate of two physicians, who do not have to be psychiatrists, that the prospective patient is "mentally ill and suitable for care and treatment." A "mentally ill" person is defined in section 2(8) of the

New York Mental Hygiene Law as "any person afflicted with mental disease to such an extent that for his own welfare or the welfare of others, or of the community, he requires care and treatment."

Thus, under New York's Mental Hygiene Law, as construed by the Court of Appeals, the so-called "emergency" (section 78) and "medical" (section 72) commitment provisions are broad enough to effect the summary hospitalization of every person alleged to be mentally ill, whether dangerous or not. There is, in New York, no class of allegedly mentally ill persons for whom the ordinary due process safeguards of prior notice and hearing are guaranteed.

In *Specht* v. *Patterson,* 386 U.S. 605, 608 (1967), this Court ruled unequivocally that "commitment proceedings whether denominated civil or criminal are subject . . . to the Due Process Clause." See also, *In Re Gault,* 387 U.S. 1 (1967).

Due process may mean different things in different contexts, but the core concept is clear: " . . . the right to be heard *before* being condemned to suffer grievous loss of any kind, even though it may not involve the stigma and hardships of a criminal conviction, is a principle basic to our society. . . . No better instrument has been designed for arriving at truth than to give a person in jeopardy of serious loss notice of the case against him and opportunity to meet it." *Joint Anti-Fascist Refugee Committee* v. *McGrath,* 341 U.S. 123, 168, 171-172 (1951) (Frankfurter, J., concurring; emphasis added).

Of course, "in extraordinary situations," the notice and hearing may follow, rather than precede, the loss. *Sniadach*

v. *Family Finance Corp.*, 395 U.S. 337, 339 (1969). In *Sniadach,* however, seven members of this Court ruled, with Mr. Justice Harlan concurring, that a temporary freeze in the "use" of wages did not meet due process requirements, even though the wage earner had the right, subsequent thereto, to contest the garnishment. The amount of garnished wages was $31.59. Mr. Justice Harlan, noting that "this deprivation cannot be characterized as de minimis," ruled that the wage earner "must be accorded the usual requirements of procedural due process: notice and a prior hearing" (395 U.S. at 342).

Petitioner Fhagen was employed as a house painter at the time of his commitment. During the seven weeks he was hospitalized he lost much more than the $31.59 whose temporary seizure was characterized as more than de minimis in *Sniadach.* And, in addition, he lost his liberty.

Similarly, in *Goldberg* v. *Kelly,* 397 U.S. 254 (1970), this Court, citing *Sniadach* and *McGrath,* ruled that welfare benefits could not be terminated without a prior evidentiary hearing, even though the recipient had the right at a subsequent hearing to contest the termination and to recoup benefits erroneously withheld.

The interests asserted by the state in *Goldberg* (conserving fiscal and administrative resources), are far more substantial than the state's negligible "public order and public health" interest in summary hospitalization of the nondangerous mentally ill. Thus, unless property is more important than liberty, the prior decisions of this Court compel reversal of the decision below.[18]

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[18] Due process requires opportunity for a hearing "at a meaningful time and in a meaningful manner." *Armstrong* v. *Manzo,* 380

In any event, once a person is already hospitalized and receiving treatment, there is no conceivable state interest that would justify extending his period of hospitalization without giving him notice and a prior opportunity for a hearing to contest the necessity for the proposed extension.

C. *Less Drastic Alternatives.*

This Court has never ruled that involuntary hospitalization is constitutionally permissible only if there are no less drastic alternatives. But the doctrine of less drastic alternatives is certainly applicable, in principle, to civil commitment proceedings. In the case of *In Re Gault,* 387 U.S. 1 (1967), for example, this Court criticized a juvenile court for failing "to explore alternatives to involuntary commitment in a civil proceeding," citing *Lake* v. *Cameron,* 124 U.S. App. D.C. 264, 364 F.2d 657 (1966), "which arose under statutes relating to treatment of the mentally ill" (387 U.S. at 28, note 41, and accompanying text).[14]

Firmly rooted in American jurisprudence is the principle that "even though the governmental purpose be legitimate," no person can be "deprived of fundamental personal liberties" if there are "less drastic means for achieving the same basic purpose." *Shelton* v. *Tucker,* 364 U.S. 479, 488 (1960).

U.S. 545, 552 (1965). Post-hospitalization hearings are inadequate because, even if successful, as they often would be (see note 5 *supra,* and accompanying text), they cannot restore the days or weeks of lost liberty which the patient suffered.

[14] See also, *Chy Lung* v. *Freeman,* 92 U.S. 275 (1875) which, though it did not involve the commitment of the mentally ill, did involve a statute which authorized the exclusion from California of lunatics, idiots, and others. The statute was held unconstitutional because it was not "limited to provisions necessary and appropriate" to achieve its purpose (92 U.S. at 280).

Application of that principle is not, as respondents have contended, limited to free speech cases. E.g., *Griswold* v. *Connecticut,* 381 U.S. 479, 485 (1965); *Aptheker* v. *Secretary of State,* 378 U.S. 500, 507-508 (1965); and *Shapiro* v. *Thompson,* 394 U.S. 618 (1969).

In *Covington* v. *Harris,* 419 F.2d 617 (D.C. Cir. 1969), and in *Wyatt* v. *Stickney,* —— F. Supp. —— (M.D. Ala., April 13, 1972, Civil Action No. 3195-N), two lower federal courts held that exploration of less drastic alternatives was a constitutional requirement in cases involving involuntary hospitalization of the mentally ill. Any other rule would be inconsistent with this Court's prior decisions, and would condemn hundreds of thousands of people to unnecessary hospitalization.[15]

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[15] There are nearly three times as many mental patients as there are prisoners. On any given day, nearly three-quarters of a million persons reside in this nation's mental hospitals—400,000 in state and county mental hospitals, and the remainder in V.A. hospitals, private hospitals, and general hospitals with psychiatric wards, such as Bellevue. At current hospitalization rates, one of every ten Americans will at some point be hospitalized for mental illness. Roughly half those persons are over the age of sixty and need nursing homes and geriatric facilities rather than psychiatric facilities. The vast majority of the remainder could more adequately be treated in community facilities on an out-patient basis. But unless the state is required to explore alternatives, they will continue to be hospitalized unnecessarily.

CONCLUSION

For the reasons set forth above, the petition for certiorari should be granted.

Respectfully submitted,

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May 12, 1972

Remittitur and Judgment of the New York Court of Appeals

COURT OF APPEALS

STATE OF NEW YORK, *ss.*:

PLEAS in the Court of Appeals, held at Court of Appeals Hall, in the City of Albany, on the 6th day of January in the year of our Lord one thousand nine hundred and seventy-two, before the Judges of said Court.

WITNESS,

THE HON. STANLEY H. FULD,
Chief Judge, Presiding.

RAYMOND J. CANNON, *Clerk.*

Remittitur January 6, 1972.

1. No. 422 71

MICHAEL FHAGEN *& ano.*,
Appellants,

—VS.—

ALAN D. MILLER, M.D., individually and as Commissioner of Mental Hygiene of the State of New York, *& ano., &c.*,
Respondents.

BE IT REMEMBERED, That on the 17th day of September in the year of our Lord one thousand nine hundred and seventy-one, Michael Fhagen & ano., the appellants in this

cause, came here unto the Court of Appeals, by Bruce J. Ennis, their attorney, and filed in the said Court a Notice of Appeal and return thereto from the order of the Appellate Division of the Supreme Court in and for the First Judicial Department. And Alan D. Miller, M.D., individually and as Commissioner of Mental Hygiene of the State of New York, & ano., &c., the respondents in said cause, afterwards appeared in said Court of Appeals by Louis J. Lefkowitz, Attorney General, & ano., their attorneys.

Which said Notice of Appeal and the return thereto, filed as aforesaid, are hereunto annexed.

WHEREUPON, The said Court of Appeals having heard this cause argued by Bruce J. Ennis, of counsel for the appellants, and by Brenda Soloff, of counsel for the respondent Miller, and after due deliberation had thereon, did order and adjudge that the order of the Appellate Division of the Supreme Court appealed from herein be and the same hereby is affirmed, without costs.

And it was also further ordered, that the records aforesaid, and the proceedings in this Court, be remitted to the Supreme Court of the State of New York, there to be proceeded upon according to law.

THEREFORE, it is considered that the said order be affirmed, without costs, as aforesaid.

And hereupon, as well the Notice of Appeal and return thereto aforesaid as the judgment of the Court of Appeals aforesaid, by it given in the premises, are by the said Court of Appeals remitted into the Supreme Court of the State of New York before the Justices thereof, according to the form of the statute in such case made and pro-

vided, to be enforced according to law, and which record now remains in the said Supreme Court, before the Justices thereof, &c.

RAYMOND J. CANNON
Clerk of the Court of Appeals
of the State of New York

COURT OF APPEALS, CLERK'S OFFICE,
Albany, January 6, 1972.

(SEAL)

I HEREBY CERTIFY, that the preceding record contains a correct transcript of the proceedings in said cause in the Court of Appeals, with the papers originally filed therein, attached thereto.

RAYMOND J. CANNON
Clerk.

**Opinion of the Supreme Court—
New York County**

SUPREME COURT

SPECIAL TERM

NEW YORK COUNTY—PART I

MICHAEL FHAGEN and MIRIAM WINTERS,

Plaintiffs,

—v.—

ALAN D. MILLER, M.D., individually and as Commissioner of Mental Hygiene of the State of New York, and ALEXANDER THOMAS, M.D., individually and as Director of the Psychiatric Division, Bellevue Hospital Center,

Defendants.

Dec. 9, 1970.

FRANCIS J. BLOUSTEIN, Justice.

Pursuant to CPLR 3001, plaintiffs challenge the constitutionality of a number of sections of the New York Mental Hygiene Law, principally Sections 72 and 78, plus Section 62.2 of Title 14 of the Official Compilation of Codes, Rules and Regulations of the State of New York, and request declaratory, injunctive and other relief. Upon this proceeding, by motion and cross motion, each of the parties seeks summary judgment.

In July 1969, plaintiff Fhagen brought a federal action (S.D.N.Y.) against defendants Miller and Thomas, raising essentially the same constitutional objections to the Mental Hygiene Law, as herein raised. On December 4, 1969, the Hon. Edward Weinfeld ruled that plaintiff Fhagen's complaint raised substantial constitutional questions and ordered the convening of a three-judge court to hear and determine the merits of the action (Fhagen v. Miller, 306 F.Supp. 634, S.D.N.Y. 1969). Thereafter, plaintiff Winters moved to intervene as a plaintiff in the pending action. On April 20, 1970, the three-judge federal court (Kaufman, C. J., Weinfeld, D. J. and Palmieri, D. J.) determined to retain jurisdiction but to withhold consideration of the constitutional issues presented until the New York State courts had an opportunity to construe the scope and meaning of the challenged provisions of the Mental Hygiene Law (Fhagen v. Miller, 312 F.Supp. 323, S.D.N.Y.). On June 22, 1970 the present proceeding was commenced and issue was fully joined on July 24, 1970.

Plaintiffs' principal attack is directed to Section 78 of the Mental Hygiene Law which deals with emergency involuntary admissions to hospitals of alleged mentally ill persons upon the application of a lay person. Section 78(1) provides that state approved hospitals may receive or retain for thirty (30) days any person "alleged to be in need of immediate observation, care or treatment for mental illness". It further provides that if, at any time after admission, the patient or anyone on his behalf gives written notice of the patient's desire for release, or if the hospital director determines that additional care and treatment beyond the thirty-day period is necessary and the patient does not consent thereto, an application for a judicial hear-

ing accompanied by the certificate of two examining physicians must be made pursuant to Section 72. The application must be filed within ten days after the giving of the notice or before the expiration of the thirty-day period.

Section 78(2) provides that once the application is filed, the admission and retention of the patient "shall be subject to all of the provisions for notice, hearing, review and judicial approval of retention or transfer and continued retention, as provided in Sections [72, 73 and 74] * * *".

Section 78(3) authorizes any peace officer to take into custody any person "who appears to be mentally ill and is conducting himself in a manner which in a sane person would be disorderly" and to remove him to any state approved hospital for immediate observation, care or treatment.

Section 78(4) provides for the apprehension and hospitalization of alleged mentally ill persons pursuant to judicial warrant, which entails, of course, the appearance of the person before a magistrate prior to hospitalization.

Section 72 establishes the so-called "two physician" or "medical admission" procedure for involuntary commitment. A person may be received or retained in a hospital if alleged to be "mentally ill and suitable for care and treatment" upon the certificate of two examining physicians accompanied by an application for admission executed within ten days prior to such admission by one of various classes of individuals, including the patient's nearest relative, a friend, a public welfare officer, community service officer, or a director of a community mental health service. The patient must be examined "forthwith" at the receiving hospital by a staff physician and "if such person is found

to be in need of care and treatment", he may be admitted. Within five days after admission, the patient must be given written notice of the application and of his right to demand a judicial hearing on the question of the need for further hospitalization. Written notice must also be given to the patient's nearest relative other than the one who signed the application, or to three additional persons designated by the patient in writing, and to the Mental Health Information Service. If the patient, or anyone on his behalf, requests in writing a hearing at any time prior to sixty days after admission a hearing must be scheduled by a court not later than five days from the receipt of that request. The court may then hear testimony and examine the patient. If the court determines the patient to be mentally ill, it may order him retained for treatment for a period not to exceed six months.

Section 74, referred to above, provides for judicial review of commitment orders, with the right of trial by jury. Thereafter, the patient may pursue normal appellate remedies.

The plaintiff Fhagen was twice committed to Bellevue Hospital pursuant to Section 78 of the Mental Hygiene Law, and his further confinement beyond thirty days was effected by invoking the "two physician" procedure of Section 72 of the Mental Hygiene Law. Fhagen was also involuntarily confined for periods of three and six months in 1962 and 1963 under other commitment procedures. Fhagen's last commitment, under Section 78(1), occurred on April 28, 1969. On May 7, 1969, the basis for his commitment was changed from Section 78 to Section 72(1), the two physicians' certificates and accompanying application being executed while he was confined and receiving treat-

ment under Section 78(1). On May 21, 1969 habeas corpus and Section 72 review proceedings were instituted, challenging the constitutionality of his confinement under Sections 78 and 72. The proceedings were twice adjourned, over plaintiff's objection, and, in the interim, he was discharged from Bellevue, on June 12, 1969. On June 17, 1969 both the Section 72 review petition and the habeas corpus petition were withdrawn.

Plaintiff Fhagen alleges that notwithstanding the fact that he is presently at liberty, he is under "constant apprehension" of renewed commitment under Sections 78 or 72. This same allegation was made in the Federal court action and was held to form a sufficient basis for standing to sue. ("* * * plaintiff does present here a justiciable controversy and a proper formal claim for equitable relief." Fhagen v. Miller, 306 F.Supp. 634, 637).

Plaintiff Winters also bases her standing upon a "constant apprehension" of renewed commitment. She, however, presents a history of only one prior commitment, pursuant to Section 78, in 1968. She was admitted involuntarily to Bellevue Hospital on May 2, 1968, after being forcibly removed from her hotel room by police officers, acting at the request of the hotel management. On May 7, 1968, the basis for her commitment was changed from Section 78(1) to Section 72(1), the physicians' certificates and accompanying affidavit having been executed during her emergency confinement under Section 78. On May 13, 1968, plaintiff Winters was discharged from Bellevue and immediately transferred to Central Islip State Hospital. She alleges that she was there advised that unless she agreed to remain as a voluntary patient she would be held involuntarily for a minimum of six

months. She so agreed and her status was converted to "voluntary" on June 18, 1968. She was discharged one month later and remains at liberty. She asserts that at no time during her confinement was she ever advised of her right to request judicial review of the necessity for her hospitalization.

In the instant action, defendants have not renewed their objection to plaintiffs' standing, save with respect to Section 72. While this court tends to view the claim of "constant apprehension" of re-commitment as a most tenuous basis for any standing to sue herein, the court will not, sua sponte, raise the question of standing in view of the Federal Court's determination and defendants' evident desire to try the case on the merits. With respect to Section 72, however, defendants' standing objection has merit and is sustained. Neither plaintiff has ever been initially admitted pursuant to Section 72 and presents no reasonable basis for claiming "apprehension" that they will suffer such fate. Even though plaintiffs will not be heard to challenge Section 72, per se, it is evident that their challenge to Section 78 necessarily involves a consideration of Section 72 procedures to the extent that these are incorporated in, and employed under, Section 78 procedures.

Subsequent to the institution of the aforementioned Federal Court action, but prior to the decision of the three-judge court (retaining jurisdiction pending the outcome of state court litigation), the State Commissioner of Mental Hygiene promulgated certain regulations with respect to Section 78 to provide additional safeguards for prospective patients (see Title 14, Official Compilation of Codes, Rules and Regulations of the State of New York, § 62.2). The new regulation provides that no patient is to

be retained under Section 78 for more than fifteen days; that a person brought to an approved hospital for admission pursuant to Section 78 shall be "forthwith examined by a staff physician" after which "the patient may be admitted" if found to be in need of immediate observation, care and treatment; that the Mental Health Information Service is to be notified promptly of the admission; that the patient is to be notified promptly (i.e., within 24 hours of admission to a ward) in writing (1) that he has a right to demand his release at any time, and, if not released, the right to receive a judicial hearing at his request on the question of need for hospitalization, (2) that the Mental Health Information Service has been notified of his admission and is available to him, (3) that he may, at any time, on his own request or anyone on his behalf, communicate with the Mental Health Information Service and avail himself of its facilities, and (4) that he may communicate once by telephone or the "next most expeditious method" with any person in the State. If the hospital director is unwilling to release the patient upon demand, such demand shall be treated as a request for a habeas corpus proceeding pursuant to section 426 of the Mental Hygiene Law and the director shall "forthwith" notify the appropriate court and the Mental Health Information Service of this habeas corpus hearing demand. This hearing in no way abrogates the obligation of the hospital to proceed with the filing of a two-physician certificate as required by Section 78(2). If it is determined that the patient requires further hospitalization, this "two physician" procedure must be effected within the shortened period of fifteen days.

Plaintiffs concede that the new regulation appears to eliminate a number of objections originally raised with

respect to the operation of Section 78, but they question whether it is within the power of the Commissioner of Mental Hygiene to promulgate such regulation, which alters the statutory scheme of MHL § 78(1) and (2). While the challenged regulation modifies somewhat the procedures obtaining under Section 78, it does not appear to be fatally inconsistent with the statute, and the court finds that the regulation is a legitimate exercise of the Commissioner's statutory authority and is, therefore, valid. (See, MHL §§ 7(5), 9(3), 11 and 12.)

Plaintiffs argue, in any event, that the new regulation does not resolve all constitutional problems raised by the statute, and contend that the statute can only be constitutionally preserved if judicially construed in the manner recited in their complaint. This court does find that the statute requires clarifying judicial construction in certain areas, but not necessarily the construction urged by plaintiffs.

One critical deficiency in the statute is the absence of clear admission standards for emergency involuntary admissions. As noted, Section 78(1) (as modified by Section 62.2) authorizes the admission of an individual if it is medically determined that he is "* * * in need of immediate observation, care or treatment for mental illness." (This is to be contrasted with the standard for non-emergency involuntary admissions under Section 72, requiring the written opinion of two examining physicians that the prospective patient is "* * * mentally ill and suitable for care and treatment.") The term "mental illness" is substantially defined under MHL § 2(8), which defines a "mentally ill person" as, a "person afflicted with mental disease to such an extent that for his own welfare or the welfare of others, or of the community he requires

care and treatment." Nowhere in the statute, however, is found any express formulation of the standard for determining that a mentally ill person is in need of "*immediate* observation, care and treatment." Plaintiffs argue that Section 78, which authorizes temporary confinement of an individual without prior notice or hearing, must be held to contravene the requirements of due process unless the sole standard for determining "immediacy" of care be that the patient constitute an immediate physical threat to himself or society. They argue that the prospective patient must be found to be "dangerous," as that term is understood at common law, i.e., keyed to physical violence. More pointedly, plaintiffs urge a rule that no person shall be considered imminently dangerous to himself or others unless there is reasonable grounds to believe that, if not immediately restrained, he would probably commit suicide or inflict substantial physical injury on other persons.

It is clear from an analysis of the Mental Hygiene Law that the Legislature never intended such a limited rigid standard for determining the need for emergency involuntary admissions. Thus, subd. 3 of Section 78 authorizes the apprehension and transmission to an approved mental hospital of any person "who appears to be mentally ill and is conducting himself in a manner which in a sane person would be disorderly." The category of "dangerously mentally ill" is recognized to be a class distinct from the general class of mentally ill persons and special provisions relating to this class have been provided by the Legislature. MHL § 85 defines the "dangerously mentally ill" patient as one "who has committed or is liable to commit an act or acts which if committed by a sane person would constitute homicide or felonious assault" or whose presence in a

regular mental hospital is "dangerous to the safety of other patients therein, the officers or employees thereof, or to the community * * *." This section prescribes the procedure, medical and judicial, for removing such patients to a maximum security facility (Matteawan State Hospital). MHL § 74 affords to "any person aggrieved," the right—not otherwise available—to challenge a decision to release a mentally ill person, in those cases where said person is "proved to be dangerous to himself and others" (see also, MHL § 76, limiting the authorization for involuntary admissions solely on the certificate of certain community mental health officials to cases where the prospective patient is deemed to be "dangerous to himself and others").

It has been definitively held that due process is not offended by a temporary confinement, without prior notice or hearing, where immediate action is necessary for the protection of society and for the welfare of the allegedly mentally ill person (Matter of Coates, 9 N.Y.2d 242, 213 N.Y.S.2d 74, 173 N.E.2d 794, app.dism. 368 U.S. 34, 82 S. Ct. 147, 7 L.Ed.2d 91; Matter of James, 22 N.Y.2d 545, 552-553, 293 N.Y.S.2d 531, 240 N.E.2d 29). "The protection of society" would appear to encompass more than prevention of murder and mayhem, and would reasonably include the traditionally recognized function of government to preserve public order, public health and public sensibilities. Thus, for example, if the allegedly mentally ill person is engaging in conduct which, if committed by a sane person, would constitute disorderly conduct, criminal nuisance, public lewdness, or sexual abuse of a minor, the State's legitimate interest in protecting society would warrant that person's temporary confinement as surely as if the individual was engaging in conduct amounting to felonious assault or homicide. Accordingly, the court deems it unwise

and unnecessary to limit the basis for emergency involuntary admission under MHL § 78 to "dangerous" conduct. An adequate workable standard is that suggested in Matter of Coates, supra, namely that such admission procedure is authorized where it is found that immediate action is necessary for the protection of society and the welfare of the allegedly mentally ill person.

Plaintiffs' challenge to the standard for admission under Section 72 is also rejected, as the same applies in a conversion of status proceeding under Section 78(2). Under the new procedures directed by Regulation 62.2, a patient admitted as an emergency case is not converted to Section 72 status until a judicial hearing is held on the question of the need for retention and further treatment, with the burden of proof thereat being upon the hospital director. Given the protection of a prior judicial hearing, a mentally ill person who requires care and treatment for his own welfare, and that of the community, but will not seek it, may be required to yield to the State's interest as parens patriae and involuntarily undergo the treatment necessary to restore him to mental health.

Plaintiffs' second principal objection to Section 78 is that it does not adequately provide for a hearing on the question of the necessity for, and propriety of, the emergency admission. Although Section 78(2) provides that upon application for conversion to Section 72 status, "the admission and retention of any such patient shall be subject to all of the provisions for notice, hearing, review and judicial approval of retention", it is not seriously questioned that the hearing on conversion to Section 72 status, concerns itself principally with the patient's need for continued treatment, not with the justification for employment of emergency admission procedures. Moreover, it has been ade-

quately demonstrated that the time frame within which the conversion hearing may be held often precludes a seasonable, meaningful review of the emergency question, per se. However, Section 426 of the Mental Hygiene Law does afford the patient a means for seasonably testing his emergency admission by way of "habeas corpus" proceeding. The federal court opined that, because of plaintiff Fhagen's experience (i.e., adjournment of the habeas corpus hearing over the objection of his counsel), this may be an "illusory remedy" (see Fhagen v. Miller, supra, 306 F.Supp. p. 637, ftn. 5). This court does not share that opinion. The remedy is real and its possible misapplication in one instance is no basis for finding it constitutionally insufficient. It will be noted, moreover, that an adjournment was granted on Fhagen's case because his application presented not merely a challenge to the legal and medical validity of his individual involuntary admission, but a full-blown challenge to the constitutionality of the law. Indeed, this challenge was found by the Federal Court to be so substantial as to warrant the convocation of a three-judge federal bench. The application was an exceptional one and the resulting adjournment to enable defendants to marshal a defense of the entire statutory scheme was at least understandable. In any event, the Commissioner's new regulation (Section 62.2) treats any request for release, after emergency, involuntary admission as an automatic habeas corpus application and mandates that the hospital director proceed "forthwith" to perfect such application for judicial review. As a consequence, this review remedy is now anything but illusory.

Defendants acknowledge that the scope of inquiry upon the habeas corpus proceeding includes the patient's mental

condition as of the date of his admission and consideration of the need for, and propriety of, the use of emergency admission procedures. Of course, the new regulation makes it clear that the right to a habeas corpus hearing is "in addition to" the right to a hearing under Section 78(2), which latter will continue to concern itself principally with the need for continued confinement for care and treatment.

Defendants agree with plaintiffs' contention that the burden of proof at said hearings is on the director of the hospital with custody of the patient, to establish that the patient met and meets the statutory standards for involuntary admission and retention. However, defendants oppose plaintiffs' contention that the standard of proof upon said hearing be that imposed by the criminal law, i.e., proof beyond a reasonable doubt. The authorities cited by plaintiffs for the contention are not persuasive. The challenged statutory provisions are part of a sweeping change made in this State's Mental Hygiene Law after extensive investigation and exhaustive study and research by the members of the legal and medical professions and other public groups. As the three-judge Federal bench observed, "The new law, the product of these studies, sought to achieve a balanced approach to the interests of the individual and the community in the administration, treatment and hospitalization of the mentally ill; it also was keyed to due process requirements and designed to provide a more meaningful judicial review than was available under the prior law." (Fhagen v. Miller, supra.) One of the more enlightened objectives was to insure the individual his due process of law while removing the aura (and stigma) of criminality obtaining in commitment proceedings under former law. (Cf. Robinson v. California, 370 U.S. 660, 666, 82 S.Ct. 1417, 8 L.Ed.2d 758.) The object of hospitalization is different from the

object of incarceration as the result of crime and the standard should be no more than the civil standard to determine the need for hospitalization so that treatment can properly begin (see, People v. Fuller, 24 N.Y.2d 292, 304, 300 N.Y.S.2d 102, 248 N.Ed.2d 17; Matter of James, supra). Plaintiffs' citation of In re Gault (387 U.S. 1, 87 S.Ct. 1428, 18 L.Ed.2d 527) is particularly inappropriate in this regard. Even where the precipitating cause for apprehension and *temporary* confinement is conduct which, if committed by a sane man, would be deemed criminal, the Mental Hygiene Law (as modified by the regulation 62.2) affords the individual a full panoply of due process protections denied to Master Gault. Moreover, it is not, nor can it be, claimed that the title "hospital", given to our regular mental institutions, is a mere euphemism for penal or correctional institutions.

Plaintiffs next urge the court to construe the "disorderly conduct" standard of Section 78(3) to have a meaning coextensive with that given to the same term in Section 240.20 of the Penal Law. (Both plaintiffs were delivered to institutions by peace officers, pursuant to this subdivision.) Since this provision is addressed to peace officers, it is reasonable to conclude that the phrase "disorderly conduct" was intended to have the same meaning given it by Penal Law Section 240.20. (That does not mean, however, that justification for admission pursuant to Section 78 [3] is dependent upon proof beyond a reasonable doubt of guilt of the violation of disorderly conduct.)

Plaintiffs also advance the contention that the statute should be read so as to require defendants to explore the possibilities of employing less drastic alternatives to full-time hospitalization, and that full-time hospitalization should be prohibited if less drastic alternatives would

suffice. Defendants assert that, within the limits of available time, personnel and facilities, they and the Mental Health Information Service, do attempt to explore the possibilities of alternative care (plaintiff Fhagen himself was released from confinement to receive outpatient treatment, although he, rather than the hospital, initiated that action); but facilities are not always equal to the need. At any rate, plaintiffs' contention as to alternative courses of treatment, however meritorious it may be, does not state a constitutional claim (cf. Lake v. Cameron, 124 U.S.App. D.C. 264, 364 F.2d 657).

Finally, plaintiffs contend that Sections 70(6), 78 and Regulation 62.2 are violative of the First, Fourth, Fifth, Sixth and Fourteenth Amendments insofar as they unreasonably limit a patient's outside communications. The statute provides (e.g., § 70 [6]) that upon admission each patient,

> "shall be given the opportunity to communicate once by telephone, or if not possible, by the next most expeditious method, with any person within the state."

However, Section 15 of the Mental Hygiene Law mandates that all patients,

> "shall be allowed to correspond without restriction with any public official and with the mental health information service."

Defendants contend that there are sound medical reasons for limiting patients' communications to "any person" of the patients' choosing. Whatever the merits of this medical judgment in each individual case, the limitation does not appear, on its face, to be constitutionally improper in view

of protection afforded patients by Section 15 of the Mental Hygiene Law.

Both sides present statistical evidence and expert opinions on the efficacy of existing and proposed alternative statutory schemes. While interesting and illuminating, this conflicting evidence is somewhat beside the point and does not raise any factual issues which preclude summary disposition of the matter. Both sides also factually contest the need for, and appropriateness of, plaintiffs' prior commitments. However, in view of the basis for standing herein (i.e., plaintiffs' fear of prospective application of the law), their individual prior experiences are of little relevance to the legal questions presented. It is to be noted that each side, by moving for summary judgment, concedes that there are no factual issues which preclude summary relief. The court concurs in this concession.

Accordingly, based upon all of the foregoing, the plaintiffs' motion for summary judgment is denied and defendants' cross motion is granted.

**Opinion of the Appellate Division—
First Department**

SUPREME COURT

APPELLATE DIVISION—FIRST DEPARTMENT

MICHAEL FHAGEN and MIRIAM WINTERS,

Plaintiffs-Appellants,

—v.—

ALAN D. MILLER, M.D., Individually and as Commissioner of Mental Hygiene of the State of New York, and ALEXANDER THOMAS, M.D., Individually and as Director of the Psychiatric Division, Bellevue Hospital Center,

Defendants-Respondents.

May 13, 1971.

Before:

CAPOZZOLI, *J.P.*, and
NUNEZ, KUPFERMAN, STEUER and EAGER, *JJ.*

PER CURIAM.

Judgment, Supreme Court, New York County (Bloustein, J.), entered January 28, 1971, unanimously modified, on the law, to the extent of striking therefrom that part of the last decretal paragraph which dismisses the complaint, and substituting therefor a provision declaring that the emergency and medical admission sections of the Mental Hygiene Law (§ 78[1] and § 72[1] are constitutional and valid and, as so modified, affirmed, without costs and without disbursements. Since this was an action for declaratory

judgment, it was error, in granting summary judgment to defendants, to direct dismissal of the complaint, and a declaration as to the constitutionality of the sections attacked should have been made. (See *Lanza* v. *Wagner,* 11 N.Y.2d 317, 334, 229 N.Y.S.2d 380, 393, 183 N.E.2d 670, 679; *New York Sporting Arms Association, Inc.* v. *City of New York,* 31 A.D.2d 793, 297 N.Y.S.2d 287 and cases cited therein.)

Opinion of the New York Court of Appeals

COURT OF APPEALS OF NEW YORK

Jan. 6, 1972.

MICHAEL FHAGEN *et al.*,

Appellants,

—v.—

ALAN D. MILLER, M.D., Individually and as Commissioner of Mental Hygiene of the State of New York, *et al.*,

Respondents.

FULD, *Chief Judge.*

We are called upon to consider the constitutionality of sections 72 and 78 of the Mental Hygiene Law, Consol. Laws, c. 27, which provide for involuntary admission of certain types of mental patients.[1]

The plaintiffs, former mental patients in New York State and New York City hospitals, asserting that they are in "constant apprehension" of being committed under sections 72 and 78 seek a judgment declaring those provisions unconstitutional. In brief, it is their position that, in authorizing involuntary hospitalization without prior notice

[1] Section 78 authorizes the director of an approved hospital to accept temporarily any person assertedly in need of *immediate care* by reason of mental illness. Section 72 deals with a person who is alleged *simply to be mentally ill*, in such a case, the certificate of two physicians is required in support of an application made on the patient's behalf by a third party (see, *infra*, p. 395).

or judicial hearing, the challenged sections deprive them, as well as all others alleged to be mentally ill, of their liberty without due process of law.

The sections in question were part of an extensive change in the Mental Hygiene Law made upon the recommendation of a special committee to study procedures for the commitment of the mentally ill. (See Special Committee to Study Commitment Procedures of Association of the Bar of the City of N. Y., Mental Illness and Due Process—Report and Recommendations on Admission to Mental Hospitals under New York Law [1962].) Section 78 provides for the involuntary admission to an approved hospital, for no longer than 30 days, of any person who is "alleged to be in need of immediate observation, care or treatment for mental illness" (subd. 1).[2] Any interested party may arrange for his hospitalization; no doctor's certificate is required. However, if the patient or someone on his behalf gives notice in writing of his desire to be released, and it is determined that he requires care and treatment in a hospital beyond the 30-day period, an application must be made, within 10 days after the giving of such notice, for his hospitalization under section 72. The same procedure must be followed, at some time before expiration of the 30-day period, even if no request for release is made, as long as the patient is still in need of further hospital care and does not agree to hospitalization as a "voluntary" or "informal" patient (Mental Hygiene Law, § 71).

Early in 1970, the State Commissioner of Mental Hygiene promulgated a regulation which shortened section 78's re-

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[2] A "mentally ill person" is defined in section 2 (subd. 8) of the Mental Hygiene Law as "any person afflicted with mental disease to such an extent that for his own welfare or the welfare of others, or of the community, he requires care and treatment".

tention period to 15 days and provided a number of other safeguards for involuntary patients (14 NYCRR 62.2; also Appendix 1, form 468a). For instance, section 62.2 of the regulations requires that a prospective section 78 patient, before being admitted to the hospital, must be "forthwith examined by a staff physician" and prompt notice of his admission given the Mental Health Information Service.[3] In addition, he must be advised that he may demand his release at any time, receive a judicial hearing as to his need for hospitalization, with counsel if desired (14 NYCRR, Appendix 1, form 468a), and, beyond that, that he must be accorded the right to habeas corpus relief (see, also, § 426).

Admission pursuant to section 72 of a person "alleged to be mentally ill and suitable for care and treatment"—and this, of course, includes an individual transferred from section 78 status—may, as indicated above (p. 394, n. 1), only be had on the certificate of two examining physicians accompanied by an application, made 10 days in advance of admission, from a relative, friend or specified official (subd. 1). Upon being brought to the hospital, the patient must be "examined forthwith by a staff physician" before he is admitted (subd. 1). Within five days, written notice of such application, along with notice of his rights, must be given to the patient, to the Mental Health Information Service and to his "nearest relative * * * other than the petitioner" (subd. 2). If a hearing is requested by any of

[3] The Mental Health Information Service is an agency established in each Judicial Department of the Supreme Court, its head and staff being "appointed and * * * removable" by the Presiding Justice of the Appellate Division for each such department. It is charged with the duties, among others, of advising the patient of his rights, studying his case and providing the court with "all * * * relevant information" concerning it (Mental Hygiene Law, § 88).

these parties, the court must schedule one within five days of receipt of the request (subd. 3) and, if none is requested within 60 days, the patient's retention beyond that time must have court sanction (§ 73). In either case, retention is authorized for no more than six months without further judicial review and, thereafter, only pursuant to continued periodic review (§ 72, subd. 3; § 73). If dissatisfied with a court order for retention or transfer, a patient or someone acting on his behalf may obtain a "rehearing and a review of the proceedings already had and of such order," with a trial, by jury if desired, on the question of the patient's mental illness (§ 74).

In July of 1969, about a year before the present proceeding was brought, Fhagen commenced a suit in the District Court for the Southern District of New York—in which plaintiff Winters later moved to intervene—raising essentially the same constitutional objections to the Mental Hygiene Law as are here advanced. Judge Weinfeld, who heard the matter, held that substantial constitutional issues were posed and ordered the convening of a three-judge court to entertain the action. (See Fhagen v. Miller, D.C., 306 F.Supp. 634.) That tribunal, in April, 1970, decided to retain jurisdiction but to abstain from passing upon the questions presented until our State courts had an opportunity to consider the challenged provisions of the Mental Hygiene Law (312 F.Supp. 323).

Two months later, the plaintiffs instituted the present action in which, as noted above, they seek a declaration that sections 72 and 78 are unconstitutional. They subsequently moved for summary judgment, and the defendants countered with a cross motion to dismiss the complaint. Among their other contentions, the plaintiffs urged that,

in order to meet due process requirements, a person may be confined under section 78 only if the term, "in need of immediate observation, care or treatment for mental illness", were to be construed as "dangerously mentally ill".[4] The court at Special Term, 65 Misc.2d 163, 317 N.Y.S.2d 128, rejected the plaintiffs' arguments, decided that the challenged provisions were constitutional and dismissed the complaint. The Appellate Division, 36 A.D.2d 926, 321 N.Y.S.2d 61, although it concurred in Special Term's conclusion of constitutionality, modified the judgment to the extent of striking from it the paragraph dismissing the complaint and substituting in its place a provision declaring the sections in question valid. We agree with that disposition.

Due process does, ordinarily, demand reasonable notice and an opportunity to be heard *in advance* of confinement or restraint. However, as we declared in Matter of Coates, 9 N.Y.2d 242, 249, 213 N.Y.S.2d 74, 79, 173 N.E.2d 797, 801), "where immediate action is necessary for the protection of society and for the welfare of the allegedly mentally ill person, [it] does not require notice or hearing as a condition precedent to valid *temporary* confinement." (Emphasis supplied.) In other words, due process does not guarantee " 'any particular form or method of * * * procedure' "; a mental patient so confined, we went on to say in *Coates*, is not unconstitutionally deprived of his liberty so long as he is afforded an opportunity within a reasonably short period "to litigate fully the question of [his] mental illness and the propriety of the proceedings which led to [his] confinement". (Matter of Coates, 9 N.Y.2d, at p. 249, 213 N.Y.S.2d, at p. 79, 173 N.E.2d, at p. 801.)

[4] Admission procedures for "dangerous mentally ill" persons are expressly dealt with in sections 76 and 85 of the Mental Hygiene Law.

Although Matter of Coates is primarily concerned with "continued" confinement, it points the conclusion here. One "afflicted with mental disease", as defined in our statute (Mental Hygiene Law § 2, subd. 8), need not be violent or dangerous to justify a short confinement prior to notice and an opportunity to be heard. The public is entitled to prompt protection against the acts of such a person which, *though not dangerous*, might, if committed by a sane person, constitute a punishable offense or which, by reason of his urgent need for immediate care and treatment, might harm others, albeit in a nonviolent manner. The "protection of society"—which we declared in *Coates* authorizes "immediate action" in the case of one allegedly mentally ill (9 N.Y.2d, at p. 249, 213 N.Y.S.2d at p. 79, 173 N.E.2d at p. 801)—requires more than the mere prevention of serious crimes of violence; it reasonably, and necessarily, includes the preservation of public order and public health. As Justice Bloustein stated at Special Term, "if the allegedly mentally ill person is engaging in conduct which, if committed by a sane person, would constitute disorderly conduct, criminal nuisance, public lewdness, or sexual abuse of a minor, the State's legitimate interest in protecting society would warrant that person's temporary confinement as surely as if the individual was engaging in conduct amounting to felonious assault or homicide" (65 Misc.2d 163, 170, 317 N.Y.S.2d 128, 136).

Moreover, since due process is not a concept to be rigidly applied, it is not offended if notice and a hearing follow confinement of a mental patient in an urgent case, as long as he is given the opportunity, within a short time, to litigate the question of his mental illness. That opportunity is amply afforded by the statutes under attack. In the

first place, a section 78 patient, under the new departmental regulations (14 NYCRR 62.2), may not be admitted to a hospital until he has been examined by a staff physician. Upon admission, he must be immediately notified of his rights, including his right to a judicial hearing as to the need for hospitalization. Further, his demand for release is to be treated as a request for habeas corpus relief, and the appropriate court and the Mental Health Information Service are to be immediately notified. He may not be retained as a section 78 patient for more than 15 days; if he is unwilling to remain on a voluntary basis, he must either be released or transferred to a section 72 status with all the protections afforded by that statute. And, moreover, the Mental Health Information Service is charged with the duty of reviewing his admission and retention and of advising him, as well as others interested in his welfare, of his right to have a judicial hearing, with counsel, and to seek independent medical opinion (§ 78, subd. 2; § 88). In view of this "protective shield of checks and balances" (Matter of Buttonow, 23 N.Y.2d 385, 390, 297 N.Y.S.2d 97, 101, 244 N.E.2d 677, 680), we find unpersuasive the plaintiffs' contention that the absence of a provision for either a preadmission, or an automatic post-admission, judicial hearing renders section 78 unconstitutional.[5]

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[5] This conclusion, we note, accords with the findings and recommendations contained in the report made by the Special Committee to Study Commitment Procedures of the Association of the Bar of the City of New York (Mental Illness and Due Process—Report and Recommendations on Admission to Mental Hospitals under New York Law [1962], pp. 7, 9, 19-28) which led to the changes in the Mental Hygiene Law (L. 1964, ch. 738). It was the committee's position that decision as to the need for hospitalization for mental illness should, in the first instance, be a medical one and that a patient's due process rights, particularly with the

Even less persuasive is the plaintiffs' challenge to the constitutionality of section 72. As indicated above, prior to his transfer to a hospital pursuant to that statute, a section 78 patient has already had notice and an opportunity for a hearing as to his need of hospitalization for mental illness as well as a right to habeas corpus relief. Then, following his transfer, he is again accorded these same rights. Moreover, he may only be admitted to a hospital under section 72 if he is found by three physicians to be "afflicted with mental disease to such an extent that for his own welfare or the welfare of others, or of the community, he requires care and treatment" (§ 2, subd. 8). And, finally, his retention as a section 72 patient beyond 60 days is subject to periodic court review and—simply upon request of the patient or of a friend or relative—a court hearing and review of an order of retention may be had, including a trial by jury, if demanded, on the question of his mental illness (§§ 73, 74). A mentally ill person, so committed and hospitalized, certainly may not be said to have been deprived of his liberty without due process of law.

We have examined the plaintiffs' other arguments and find them without substance.

The order appealed from should be affirmed, without costs.

Burke, Scileppi, Bergan, Breitel, Jasen and Gibson, JJ., concur.

Order affirmed.

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assistance of an agency such as the Mental Health Information Service, would be amply protected by immediate post-admission notice and opportunity for a hearing. (See, also, Broderick, Involuntary Hospitalization for Mental Illness, 20 Catholic U.L. Rev. 547, 620.)

Statutes Involved

Sections 78 and 72 of the New York Mental Hygiene Law, Vo. 34A McKinney's Consolidated Laws of New York Annotated, provides in pertinent part as follows:

Section 78 ("lay" commitment):

1. The director of any hospital (other than a licensed private institution) maintaining adequate staff and facilities for the observation, examination, care and treatment of persons alleged to be mentally ill and approved by the commissioner to receive and retain patients pursuant to this section may receive or retain therein as a patient for a period of thirty days any person alleged to be in need of immediate observation, care or treatment for mental illness.

2. If at any time after such admission a patient, or any person on the patient's behalf, gives notice in writing of the patient's desire to be released, or if prior to the expiration of such thirty-day period the director determines that the patient requires care and treatment in a hospital beyond such period and such patient does not agree to remain in such hospital or apply for admission to another hospital as a voluntary patient or an informal patient, an application for hospitalization made as provided in section seventy-two of this article, accompanied by the certificate or certificates of two examining physicians supporting the application, shall be filed with a hospital. Such application shall be filed within ten days after the giving of such notice and, when no such notice has been given, on or before the expiration of

such thirty-day period. Upon the filing of such application, the admission and retention of any such patient shall be subject to all of the provisions for notice, hearing, review and judicial approval of retention or transfer and continued retention, as provided in sections seventy-two, seventy-three and seventy-four of this article, provided that for the purposes of such provisions the date of admission of the patient shall be deemed to be the date on which such application is filed or the date on which said thirty-day period terminates, whichever occurs earlier. The notice of such application given pursuant to subdivision two of section seventy-two of this article shall include a statement that the patient may be subject to transfer to a state hospital or other hospital, as provided in subdivision five of this section.

3. Any peace officer of the state or of a county, town, village and city maintaining a police department organized pursuant to the laws of this state may take into custody any person who appears to be mentally ill and is conducting himself in a manner which in a sane person would be disorderly, and may direct his removal or remove him to any hospital specified in subdivision one of this section or temporarily detain any such person in another safe and comfortable place pending his examination or admission to any such hospital.

Section 72 ("medical" commitment):

1. The director of a hospital may receive and retain therein as a patient any person alleged to be mentally ill and suitable for care and treatment upon

certificate or certificates of two examining physicians accompanied by an application for the admission of such person executed within ten days prior to such admission by any person with whom the person alleged to be mentally ill may reside or at whose house he may be, or the father or mother, husband or wife, brother or sister, or the child of any such person, or the nearest relative or friend available, or the committee of such person, or an officer of any well recognized charitable institution or agency or home, or any social service officer of the town, any town or community service officer or commissioner of social services, or director of community mental health services, of the city or county in which any such person may be, or in the case of the admission of any such person to a hospital operated by the state or a political subdivision thereof, by the director of such hospital or by the director or head of any other hospital where such person may be, or the director or person in charge of a facility provided in-patient care to certified narcotic addicts assigned or transferred thereto by the narcotic addiction control commission. Such application shall contain a statement of the facts upon which the allegation of mental illness and need for care and treatment are based, and shall be executed under penalty of perjury but shall not require the signature of a notary public thereon. The director of the hospital where such person is brought shall cause such person to be examined forthwith by a staff physician of such hospital other than the original examining physicians whose certificate or certificates accompanied the application, and if such person is found to be in need of care and treatment he may be

admitted thereto as a patient as herein provided. Such original examining physician may be the director or staff member of a hospital operated or maintained by the state or a political subdivision thereof to which it is proposed to admit such person, provided, however, that in case of admission of such person to a hospital operated by the state only one such examining physician may be on the staff thereof, and in the case of admission of such person to a hospital operated or maintained by a political subdivision of the state both such examining physicians may be on the staff thereof and in the case of admission of such person to a licensed private institution, neither such examining physician may be on the staff thereof.

2. The director shall cause written notice of such application to be given the person alleged to be mentally ill not later than five days, excluding Sunday and holidays, after such admission and such notice shall set forth such person's rights under the provisions of this section. At the same time such notice shall also be given to the mental health information service and personally or by mail to the nearest relative of the person alleged to be mentally ill other than the petitioner if there be any such person known to the director, and to as many as three additional persons if designated in writing by the person alleged to be mentally ill to receive such notice.

3. If at any time prior to the expiration of sixty days from the date of admission of such patient, he or any relative or friend or the mental health information service gives notice in writing of request for hearing on the question of need for hospitalization to

the director, a hearing shall be held as herein provided. The patient or person requesting a hearing on behalf of the patient may designate the county where the hearing shall be held, which shall be either in the county where the hospital is located, the county of the patient's residence or the county in which the hospital to which the patient was first admitted is located and such hearing shall be held in the county so designated, subject to application by any interested party, including the director, for change of venue to any county because of the convenience of parties or witnesses or the condition of the patient. It shall be the duty of the director upon receiving notice of such request for hearing to forward forthwith a copy of such notice with a record of the patient as defined and described in section twenty of this chapter to a court of record in the county designated by the applicant, if one be designated, or if no designation be made, then to a court of record in the county where such hospital is located. A copy of such notice and record shall also be given the mental health information service. The court which receives such notice shall fix the date of such hearing at a time not later than five days from the date such notice is received by the court and cause the patient or other person requesting the hearing, the director, the mental health information service and such other persons as the court may determine to be advised of such date. Upon such date, or upon such other date to which the proceeding may be adjourned, the court shall hear testimony and examine the person alleged to be mentally ill, if it be deemed advisable in or out of court, and shall render a decision in writing as to the mental illness and

the need for retention of the patient. If it be determined that the patient is mentally ill and in need of retention for care and treatment, the court shall forthwith issue an order authorizing the retention of such patient for care and treatment in the hospital for a period not to exceed six months from the date of the order or if the patient is in a psychiatric hospital maintained by a political subdivision of the state or in a general hospital the court may order the patient transferred to the jurisdiction of the department for retention in a hospital operated by the state designated by the commissioner or to a licensed private institution for retention therein for a period not to exceed six months from the date of such order. If, however, it appears that such mentally ill person is harmless and his relatives or a committee of his person are willing and able properly to care for him, at some place other than a hospital, then, upon their written consent, the court may order the transfer of the patient to the care and custody of such relatives or such committee. If the court cannot hear the application it may appoint a referee to hear and report forthwith the testimony with his opinion thereon, to the court, which if satisfied with such report shall issue its order in accordance with this subdivision.

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Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-1493

MICHAEL FHAGEN and MIRIAM WINTERS,

Petitioners,

against

ALAN D. MILLER, M.D., individually and as Commissioner of Mental Hygiene of the State of New York, and ALEXANDER THOMAS, M.D., individually and as Director of the Psychiatric Division, Bellevue Hospital Center,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

BRIEF IN OPPOSITION FOR RESPONDENT MILLER

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Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

BRIEF IN OPPOSITION FOR RESPONDENT MILLER

Questions Presented

1. Whether this case presents a present, live controversy.

2. Whether patients may be admitted to mental hospitals on doctors' certificates for a limited period of time and given the opportunity to request a judicial hearing after admission.

3. Whether providing a full-scale hearing on hospitalization only after request of the patient or someone acting in his behalf exacts an unconstitutional waiver of the right to a hearing and counsel.

4. Whether the exploration of so-called "less drastic alternatives" is constitutionally mandated prior to involuntary admission to a mental hospital.

Statement of the Case

Petitioners are both former patients at facilities run by respondents. Mr. Fhagen was last discharged in June, 1969.* Miss Winters was discharged in July, 1968.** It is not asserted that either has been hospitalized since then. Alleging themselves to be in "constant apprehension" of further hospitalization, petitioners sought declaratory and injunctive relief in the New York State courts against the continued operation of New York Mental Hygiene Law, §§ 72 and 78 providing for involuntary and emergency admissions to mental hospitals.*** Both sections were found

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* Mr. Fhagen was previously hospitalized in 1962 for 3 months, in 1964 and in 1967 for six months. His 1969 hospitalization was for under two months. All admissions were the result of acts of violence by petitioner.

** Miss Winters was hospitalized for 2½ months; during the last month of that period and until her discharge she was a voluntary patient. She was admitted for reasons sharply at variance with the facts set forth in the petition (p. 4).

*** An action originally was instituted in the United States District Court for the Southern District of New York alleging the same "apprehension" and requesting the same relief. Finding that there was a real controversy and that substantial question were presented, the single district judge ordered the convening of a three-judge district court. *Fhagen* v. *Miller*, 306 F. Supp. 634 (S.D.N.Y. 1969). That Court abstained from a decision on the merits (69 Civ. 3218 [S.D.N.Y. 1970]) and the State proceeding followed. On March 21, 1972, the complaint was dismissed on the authority of *England* v. *Louisiana State Board of Medical Examiners*, 375 U.S. 411.

by the state courts to be constitutional. *Fhagen* v. *Miller*, 65 Misc. 2d 163, 317 N.Y.S. 2d 128 (Sup. Ct. N.Y. Co. 1970), *modified and affirmed* 36 A.D. 2d 926, 321 N.Y.S. 2d 61 (1st Dept. 1971), affirmed 29 N.Y. 2d 348, 328 N.Y.S. 2d 393 (1972).

Mental Hygiene Law, § 78, as modified by regulation (14 N.Y.C.R.R. § 62.2), provides that certain facilities may receive persons "alleged to be in need of immediate observation, care or treatment for mental illness" and may retain such patients for no more than 15 days. This period may be shortened by notice by the patient or someone on his behalf of the desire to leave in which case the hospital must, if it feels retention is necessary, file papers pursuant to Mental Hygiene Law, § 72, authorizing retention for an additional 60 days. A Section 78 patient must, on admission, be notified in writing that he has the right to demand his release at any time and, if not released, to receive a judicial hearing and that the Mental Health Information Service has been told of his admission and is available to him. A demand for release which the hospital is unwilling to meet is to be treated as a request for habeas corpus pursuant to N.Y. Mental Hygiene Law, § 426 and the appropriate court and the Mental Health Information Service are to be notified. This proceeding does not abrogate the obligation of the hospital to file a two-physician certificate as required by Mental Hygiene Law, § 78(2).

Under Mental Hygiene Law, § 72 the director of a hospital may receive and retain as a patient any person alleged to be mentally ill and suitable for care and treatment on the certificate of two examining physicians, accompanied by an application for the admission of such persons executed no more than ten days earlier by one of certain specified people. On admission, the patient must be examined forthwith by a staff physician and, within five days of his admission, he must be given notice of his right to demand a judicial hearing on the question of his need for further hospitalization. Notice must also be given to the

patient's relatives or friends and to the Mental Health Information Service, each of whom may demand a hearing. After the hearing the Court may order the patient retained in the hospital for a period not to exceed six months, may transfer care and custody of the patient to his relatives or a committee, or may release the patient.

If no demand for a hearing is made within the first sixty days, any longer retention may be had only on application by the director for a court order of retention. A hearing may be had on demand. If no hearing is requested, the Court may, if satisfied that retention is necessary, issue an order authorizing retention for up to six months. Thereafter, similar orders must be sought after a year and after each subsequent two years (N.Y. Mental Hygiene Law, § 73). Any order of retention may be reviewed before another judge and a jury (N.Y. Mental Hygiene Law, § 74).

The Mental Health Information Service was established in 1964 with offices in each of the judicial departments of the State. It is responsible for studying and reviewing the admission and retention of patients, informing those patients and others interested in their welfare about admission and retention procedures and of the rights to hearings and review, to counsel and to independent medical opinion. The Service may demand hearings; it may represent patients. It must inform the Court of the relevant material during any pending proceeding (N.Y. Mental Hygiene Law, § 88).

In the New York Court of Appeals, petitioners claimed that:

1. Mental Hygiene Law, § 78 could not constitutionally mean that persons not dangerous to themselves or others could be summarily hospitalized without prior notice or hearing;

2. Mental Hygiene Law, § 72 is unconstitutional because it does not require that patients be danger-

ous to themselves or others or lack the ability to decide for themselves whether or not they should be hospitalized;

3. Mental Hygiene Law, §§ 72 and 78 are unconstitutional because they presume a "waiver" of the right to a hearing and counsel;

4. The need for hospitalization must be proved beyond a reasonable doubt; and

5. Due process requires that hospitalization may not be ordered where "less drastic alternatives would suffice."

In a unanimous opinion by Chief Judge Fuld the Court rejected these contentions and found the challenged statutes to establish reasonable standards and ample procedural safeguards.

Subsequent to the decision below, the New York State Legislature enacted a new Mental Hygiene Law which will become effective on January 1, 1973. As relevant to the issues before this Court, the new law (§ 31.39) provides that a hospital may admit on an emergency basis:

> "any person alleged to have a mental illness for which immediate observation, care and treatment in a hospital is appropriate and which is likely to result in serious harm to himself or others. 'Likelihood to result in serious harm, as used in this article shall mean:
>
> (1) substantial risk of physical harm to himself as manifested by threats of or attempts at suicide or serious bodily harm or other conduct demonstrating that he is dangerous to himself, or
>
> (2) a substantial risk of physical harm to other persons as manifested by homicidal or other violent behavior by which others are placed in reasonable fear of serious physical harm."

A complete copy of this section is annexed hereto as Appendix "A".

The new medical admission sections (§ 31.27) preserve the principle of Section 72. A complete copy of these sections are annexed hereto as Appendix "B". One significant addition is § 31.27(d) which provides:

> "Before an examining physician completes the certificate of examination of a person for involuntary care and treatment, he shall consider alternative forms of care and treatment that might be adequate to provide for the person's needs without requiring involuntary hospitalization. If the examining physician knows that the person he is examining for involuntary care and treatment has been under prior treatment, he shall, insofar as possible, consult with the physician or psychologist furnishing such prior treatment prior to completing his certificate. Nothing in this section shall prohibit or invalidate any involuntary admission made in accordance with the provisions of this chapter."

REASONS FOR DENYING CERTIORARI

I

Since neither petitioner is in a mental hospital there is no justiciable controversy between the parties.

Respondents asserted in the federal action that petitioners did not set forth a case or controversy because neither was in a hospital.* The argument was not raised in the state courts although at least one court seemed very dubious that the allegation of "constant apprehension" was sufficient to confer standing (Pet. p. 27). Now that petitioners once more seek relief from a court bound by

* Petitioner Winters was not a plaintiff in the federal action. Her motion to intervene in that case was not decided. At the time she made the motion, she was not a patient.

Article III of the United States Constitution it must again be pointed out that petitioners are not now hospitalized; they have not been hospitalized for three and four years respectively; they have never claimed that their mental health is such that there is any immediate (or remote) possibility of their being involuntarily placed in such a hospital. Accordingly, there is no "substantial controversy between parties having adverse legal interests, of sufficient immediacy and reality to warrant the issuance of a declaratory judgment." *Maryland Gas Co.* v. *Pacific Coal and Oil Co.*, 312 U.S. 270, 273. See also, *Lake Carriers' Assn.* v. *MacMullan*, —— U.S. ——, 40 U.S. L. Week 4569 (May 30, 1972); *Golden* v. *Zwickler*, 394 U.S. 103, 110.

Previous hospitalization does not create a presumption that petitioners will deteriorate to a degree requiring future hospitalization. Petitioners do not suggest it. Moreover, on January 1, 1973 the new Mental Hygiene Law will go into effect. After that date emergency admission, the only kind under which petitioners have ever been initially hospitalized will be governed by the very danger standard for which they argue. Accordingly, the possibility of their future hospitalization becomes even more speculative than it was below.

II

The decision below was correct and consistent with decisions of this Court.

A. The New York Statutes Exact No Waiver At All From Patients.

Petitioners describe the failure to request a hearing as a presumed waiver of rights and the right to a hearing itself as a "sham" (Pet. pp. 6-7). They cite out-of-context statistics and inapposite cases to fashion a constitutional claim which is legally incorrect and medically unsound. The argument is merely another way of stating the claim that no one should be hospitalized without a

hearing (B. *infra*). The theory totally misconceives the nature of waiver. A waiver refers to the future irreversible consequences of a failure to act. However, failure to request a judicial hearing in no way precludes any subsequent request for a hearing and is not a waiver of the right to review. Because at least with the substantial safeguards provided in New York, a pre-admission hearing is not mandated, labelling the failure to request such a hearing an impermissible waiver adds nothing to the argument.

Petitioners deduce from selected statistics that many more people would be released if hearings were mandatory. In fact, since 1964, when sweeping changes were made in the Mental Hygiene Law, the turnover rate at state hospitals has increased sharply and the average stay of new patients in such hospitals is 45 days. Obviously, there is a more efficient process occurring than a multistep formal judicial process. It is just as easy to surmise that such procedures are not necessary as it is to bemoan their absence. And, notwithstanding petitioners' attempts to downgrade its value (Pet. p. 5, n. 3), it is clear that one of the important factors in this process is the Mental Health Information Service. Indeed, in *Thorn* v. *Superior Court,* 83 Cal. Rep. 600, 464 P. 2d 56 (1970) cited by petitioners, the Court directed participation by counsel in a manner analogous to the services provided by the Mental Health Information Service. And, in *Anderson* v. *Solomon,* 315 F. Supp. 1192 (D. Md. 1970), also cited by petitioners (p. 12, n. 12), the Court indicated that its result would have been different had Maryland had an agency like the Mental Health Information Service. Such an agency has recently been established in Maryland.

Review which is desired is easily obtained. The patient need not have the initiative to request it himself. Anyone may do it for him. Even if no one requests it, a Court must periodically review the record, on notice to the patient, his relative or friends and the Mental Health Information Service.

B. Direct Admission To A Mental Hospital Does Not Contravene Due Process of Law.

Both petitioners were initially admitted to Bellevue Hospital under § 78 of the Mental Hygiene Law, the emergency admission section. Obviously, their admission under that provision did not require a prior hearing, especially in light of the procedural safeguards afforded. Both petitioners were subsequently converted to § 72 status. They claim that such hospitalization was a denial of due process of law and label what in reality is medical admission as "summary" admission. However, once a person is already a patient, it is of no constitutional significance that he is given a new status and then a hearing rather than the reverse. In any event, he is still in the hospital and will have had the opportunity to test the necessity for his admission. Accordingly, neither petitioner has a basis to challenge the law.

The present provisions of the Mental Hygiene Law are the result of an extensive investigation prompted by growing understanding of the nature of mental illness and by increasingly sophisticated methods of treatment. The revisions sought, among other things, to move away from judicial and toward medical admission to mental hospitals both in order to remove the stigma and trauma of incarceration so frequently attached to hospitalization for mental illness, and to provide swift admission, treatment and discharge. The changes, which in substance follow the recommendations of a distinguished panel of doctors, lawyers, judges and teachers, were made with careful attention to the requirements of due process of law and, indeed, were designed to provide more meaningful judicial review than was available under prior law. See MENTAL ILLNESS AND DUE PROCESS: REPORT AND RECOMMENDATIONS ON ADMISSION TO MENTAL HOSPITALS UNDER NEW YORK LAW BY THE SPECIAL COMMITTEE TO STUDY COMMITMENT PROCEDURES OF THE ASSOCIATION OF THE BAR

OF THE CITY OF NEW YORK IN COOPERATION WITH THE CORNELL LAW SCHOOL (1962) (hereinafter MENTAL ILLNESS AND DUE PROCESS). Most of the relief sought by petitioners would return New York to a form of admission to mental hospitals found by the Legislature to be totally unsatisfactory.

In fact, the New York statutory scheme for involuntary hospitalization of the mentally ill is unimpeachable. The direct admission procedure is merely one aspect of that scheme, and must be considered along with the fact that admission is for a limited time and is accompanied by the prompt involvement of a court-connected agency, the Mental Health Information Service, and the opportunity for a hearing. *Matter of Coates,* 9 N.Y. 2d 242, 250, 254 *app. dism. for want of a substantial federal question* 368 U.S. 34. *Coates,* indeed, is dispositive of this case. Even if no hearing is requested the patient cannot be retained beyond 60 days without a court order. As thus constituted, the New York law is entirely consistent with due process, taking proper account of the unique status of the mental patient both from a medical and judicial point of view. Indeed, the New York procedure implements the holding of this Court that to treat a person who is mentally ill as though he were a criminal, to "try" and "convict" him for his illness, would be cruel and unusual punishment. *Robinson* v. *California,* 370 U.S. 600, 666.

C. The Exploration Of "Less Drastic" Alternatives To Full-Time Hospitalization Is Not A Constitutional Requirement.

Petitioners contend that the present New York policy (soon to be a statutory requirement) of exploring alternatives to hospitalization is a constitutional rule. It is not. The requirement for exploring alternative methods for achieving a valid purpose is a direct outgrowth of the "overbreadth" principle applicable in First Amendment

cases. That is, where the inquiry is whether or not a policy abridges a virtually unconditional right, such as free speech (*Shelton* v. *Tucker,* 364 U. S. 479) marital privacy (*Griswold* v. *Connecticut,* 381 U. S. 479) or the right to travel (*Shapiro* v. *Thompson,* 394 U. S. 618), the policy must not only represent a compelling state interest but it must not overstep the bounds represented by the compelling interest. However, "[i]n other areas involving different constitutional issues, more administrative leeway has been thought allowable in the interest of increased efficiency in accomplishing a clearly constitutional central purpose." *Shelton* v. *Tucker, supra* at 488 n. 8.

Accordingly, the District of Columbia Circuit, which initially announced its requirement of such exploration in statutory terms (*Lake* v. *Cameron,* 364 F. 2d 657 [D. C. Cir. 1966]), has been overhasty in transforming this requirement into a constitutional rule. *Covington* v. *Harris,* 419 F. 2d 617 (D. C. Cir. 1969).

Moreover the point is not justiciable since there is no expressed intention to do other than explore such alternatives. Certainly, New York is beginning to establish facilities for care other than full-time hospitalization, but these facilities are not equal to the need for them. This is an area which can only be dealt with as facilities become available and no Constitutional rule can make them available. *Jefferson* v. *Hackney,* —— U.S. —— (May 30, 1972); *Dandridge* v. *Williams,* 397 U.S. 471, 487. The only thing the announcement of policy as a constitutional rule would achieve would be to foment endless litigation over the available facilities.

CONCLUSION

The petition for a writ of certiorari should be denied.

Dated: New York, N. Y., June 23, 1972.

Respectfully submitted,

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Appendix A.

§ 31.39 Emergency admissions for immediate observation, care, and treatment.

(a) The director of any hospital maintaining adequate staff and facilities for the observation, examination, care, and treatment of persons alleged to be mentally ill and approved by the commissioner to receive and retain patients pursuant to this section may receive and retain therein as a patient for a period of fifteen days any person alleged to have a mental illness for which immediate observation, care, and treatment in a hospital is appropriate and which is likely to result in serious harm to himself or others. "Likelihood to result in serious harm" as used in this article shall mean:

(1) substantial risk of physical harm to himself as manifested by threats of or attempts at suicide or serious bodily harm or other conduct demonstrating that he is dangerous to himself, or

(2) a substantial risk of physical harm to other persons as manifested by homicidal or other violent behavior by which others are placed in reasonable fear of serious physical harm.

The director shall cause to be entered upon the hospital records the name of the person or persons, if any, who have brought such person to the hospital and the details of the circumstances leading to the hospitalization of such person.

The director shall admit such person pursuant to the provisions of this section only if a staff physician of the hospital upon examination of such person finds that such person qualifies under the requirements of this section. Such person shall not be retained for a period of more than forty-eight hours unless within such period such finding is confirmed after examination by another physician who shall be a member of the psychiatric staff of the hos-

pital. Such person shall be served, at the time of admission, with written notice of his status and rights as a patient under this section. Such notice shall contain the patient's name. At the same time, such notice shall also be given to the mental health information service and personally or by mail to such person or persons, not to exceed three in number, as may be designated in writing to receive such notice by the person alleged to be mentally ill. If at any time after admission, the patient, any relative, friend, or the mental health information service gives notice to the director in writing of request for court hearing on the question of need for immediate observation, care, and treatment, a hearing shall be held as herein provided as soon as practicable but in any event not more than five days after such request is received, except that the commencement of such hearing may be adjourned at the request of the patient. It shall be the duty of the director upon receiving notice of such request for hearing to forward forthwith a copy of such notice with a record of the patient to the supreme court or county court in the county where such hospital is located. A copy of such notice and record shall also be giver the mental health information service. The court which receives such notice shall fix the date of such hearing and cause the patient or other person requesting the hearing, the director, the mental health information service and such other persons as the court may determine to be advised of such date. Upon such date, or upon such other date to which the proceeding may be adjourned, the court shall hear testimony and examine the person alleged to be mentally ill, if it be deemed advisable in or out of court, and shall render a decision in writing that there is reasonable cause to believe that the patient has a mental illness for which immediate inpatient care and treatment in a hospital is appropriate and which is likely to result in serious harm to himself or others. If it

be determined that there is such reasonable cause, the court shall forthwith issue an order authorizing the retention of such patient for any such purpose or purposes in the hospital for a period not to exceed fifteen days from the date of admission. Any such order entered by the court shall not be deemed to be an adjudication that the patient is mentally ill, but only a determination that there is reasonable cause to retain the patient for the purposes of this section.

(b) Within fifteen days of arrival at the hospital, if a determination is made that the person is not in need of involuntary care and treatment, he shall be discharged unless he agrees to remain as a voluntary or informal patient. If he is in need of involuntary care and treatment and does not agree to remain as a voluntary or informal patient, he may be retained beyond such fifteen day period only by admission to such hospital or another appropriate hospital pursuant to the provisions governing involuntary admission, on application supported by medical certification and subject to the provisions for notice, hearing, review, and judicial approval of retention or transfer and retention governing such admissions, provided that, for the purposes of such provisions, the date of admission of the patient shall be deemed to be the date when the patient was first received under this section. If a hearing has been requested pursuant to the provisions of subdivision (a), the filing of an application for involuntary admission on medical certification shall not delay or prevent the holding of the hearing.

Appendix B.

§ 31.27 Involuntary admission on medical certification.

(a) The director of a hospital may receive and retain therein as a patient any person alleged to be mentally ill and in need of involuntary care and treatment upon the certificates of two examining physicians, accompanied by an application for the admission of such person. The examination may be conducted jointly but each examining physician shall execute a separate certificate.

(b) Such application must have been executed within ten days prior to such admission. It may be executed by any one of the following:

1. any person with whom the person alleged to be mentally ill resides.
2. the father or mother, husband or wife, brother or sister, or the child of any such person or the nearest available relative.
3. the committee of such person.
4. an officer of any well recognized charitable institution or agency or home in whose institution the person alleged to be mentally ill resides.
5. the director of community services or social services official, as defined in the social service law, of the city or county in which any such person may be.
6. the director of the hospital in which the patient is hospitalized.

(c) Such application shall contain a statement of the facts upon which the allegation of mental illness and need for care and treatment are based and shall be executed under penalty of perjury but shall not require the signature of a notary public thereon.

(d) Before an examining physician completes the certificate of examination of a person for involuntary care and treatment, he shall consider alternative forms of care and treatment that might be adequate to provide for the person's needs without requiring involuntary hospitalization. If the examining physician knows that the person he is examining for involuntary care and treatment has been under prior treatment, he shall, insofar as possible, consult with the physician or psychologist furnishing such prior treatment prior to completing his certificate. Nothing in this section shall prohibit or invalidate any involuntary admission made in accordance with the provisions of this chapter.

(e) The director of the hospital where such person is brought shall cause such person to be examined forthwith by a physician who shall be a member of the psychiatric staff of such hospital other than the original examining physicians whose certificate or certificates accompanied the application and, if such person is found to be in need of involuntary care and treatment, he may be admitted thereto as a patient as herein provided.

(f) Following admission to a hospital, no patient may be sent to another hospital by any form of involuntary admission unless the mental health information service has been given notice thereof.